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ALEXANDER L. STEVAS,

No. 80-2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. PORTIS HICKS
JIRO MURASE
WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022
(212) 832-3333

Attorneys for Petitioner

Of Counsel:

EDWARD H. MARTIN
CARL J. GREEN
WENDER, MURASE & WHITE

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In its petition for a writ of certiorari filed June 6, 1981 (Docket No. 80-2070), petitioner Sumitomo Shoji America, Inc. ("Sumitomo") presented as one of the grounds for granting the petition the existence of a conflict between the decision below of the United States Court of Appeals for the Second Circuit, reported at 638 F.2d 552 (App. A to Petition, 1a-15a), and an April 24, 1981 decision on the same matter by the majority of a panel of the United States Court of Appeals for the Fifth Circuit in *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353 (5th Cir. 1981) (App. F to Petition, 63a-97a).

Respondents filed a cross-petition with this Court on July 1, 1981 (Docket No. 81-24), and also filed a response to Sumi-

tomo's petition on August 3, 1981. In their cross-petition, respondents cited with approval the dissenting opinion in *Spiess, supra.*

By order dated August 7, 1981, the Fifth Circuit granted a petition by the plaintiffs in *Spiess* for rehearing en banc. A copy of the August 7, 1981 order of the Fifth Circuit is appended hereto. The effect of that order is to vacate the Fifth Circuit panel's decision of April 24, 1981 (5th Cir. R. 17). The Fifth Circuit's August 7, 1981 order therefore technically eliminates, at least for the time being, the conflict between circuits.

One can merely speculate as to whether the rehearing en banc by the Fifth Circuit in *Spiess* will result in a decision consistent with the Second Circuit's decision below. If the Fifth Circuit issues an en banc decision in *Spiess* which remains in conflict with the Second Circuit's decision below, the confusion which these cases have already engendered in respect of the relationship of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 (1953) ("the Treaty") to Title VII of the Civil Rights Act, as amended, 42 U.S.C. §§ 2000e *et seq.*, will only be compounded.*

Even absent a conflict between circuits, however, there are other good reasons for this Court to grant Sumitomo's petition. Sumitomo has raised an important question of the relationship between domestic civil rights legislation and U.S. international obligations under the Treaty and similar friend-

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* For example, if the Fifth Circuit's en banc panel adopts the reasoning of Judge Reavley's dissenting opinion to the April 24, 1981 decision, a conflict between circuits will still exist. While the majority of the Fifth Circuit panel disagreed with the limits the Second Circuit placed on the extent of the protection granted to a U.S. subsidiary of a Japanese company by the employment right provision of Article VIII(1) of the Treaty, Judge Reavley concluded that a U.S. subsidiary of a Japanese company does not even have capacity to invoke that employment right provision, a view which the Second Circuit unanimously rejected.

ship, commerce and navigation treaties whose common purpose is to promote and protect private international investment and trade. This question should be resolved so as to clarify the rights of foreign investors under such treaties to control and manage, with key personnel of their choice, the enterprises they establish or acquire in the United States, and also to define for U.S. investors the basis for asserting their reciprocal rights abroad.

Sumitomo renews its prayer that this Court grant the petition for a writ of certiorari to review the decision below of the United States Court of Appeals for the Second Circuit, and resolve the question of whether the right granted by Article VIII(1) of the Treaty to fill management level positions with Japanese nationals is limited by Title VII. If this Court views the Fifth Circuit's order in *Spiess* granting rehearing en banc as rendering it inappropriate to grant Sumitomo's petition, Sumitomo respectfully requests that this Court defer its consideration of the petition and the cross-petition, pending issuance of the Fifth Circuit's en banc decision.

Respectfully submitted,

J. PORTIS HICKS
JIRO MURASE
WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022
(212) 832-3333

Attorneys for Petitioner

Of Counsel:

EDWARD H. MARTIN
CARL J. GREEN
WENDER, MURASE & WHITE

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